Malayan United Finance Bhd v Sun Chong Construction Sdn Bhd & Ors

HIGH COURT (MUAR) — CIVIL SUIT NO 23-37-1986
RICHARD TALALLA J
26 JUNE 1995

Civil Procedure *— Trial — Further argument — Circumstances in which an order for further argument may be granted*

Civil Procedure *— Service — Substituted service — Whether non-compliance with the Rules and Practice Note nullifies the proceedings*

The plaintiff granted a loan to the first defendant. It was personally guaranteed by the second and third defendants. The defendants failed to service the loan despite repeated demands. The plaintiff issued a writ against the defendants. But it failed on all three occassions to serve it on the second and third defendants. Substituted service was effected pursuant to a court order. A judgment in default of appearance was entered against the second and the third defendants. The third defendant did not pay the judgment debt despite his being served with a copy of the judgment and later a bankruptcy notice and creditor's petition.

Three years later, the second and third defendants applied for an order to set aside the default judgment on the ground that the process of service was irregular and that there was a defence on the merits. Their application before the senior assistant registrar was allowed and leave was given to file their defence. The plaintiff appealed against the decision. The appeal was dismissed by the learned judge. The plaintiff applied for further argument pursuant to the provisions of O 56 r 2(2) of the Rules of the High Court 1980 ('the Rules'). The learned judge allowed the plaintiff's application. The defendants raised two preliminary objections: (1) that the case had already been argued and decided, there was no argument before the learned judge and that therefore the application for further argument should not have been allowed; (2) that no further evidence or affidavits should be entertained. The objections were disallowed. The further argument was heard.

The parties argued, inter alia, about the issue of whether the non-compliance with the relevant Rules and Practice Note No 1 of 1968 nullified the proceedings and therefore the judgment should be set aside.

Held, setting aside the previous order and the order of the senior assistant registrar, costs to the appellant:

(1) As to the first preliminary objection, O 56 r 2, which since then has been substituted by a new rule, was intended to

provide for a more detailed examination and consideration of a chamber matter in the general list dealt with in the hurly burly of chamber sittings replete with often a ten minute rule. It provided against the very mischief that occured in the instant case where the court peremptorily dismissed the appeal believing that counsel had conceded defeat when in fact counsel had only conceded one point and was about to proceed to argue the matter when the next case on that day's cause list was called out. It must be treated as an allowance of further hearing of the appeal as the judge was empowered to allow, seeing that the order he made had not been perfected.

(2) In respect of the second preliminary objection, as the new affidavits were filed by consent, the defendants could not then renege.

(3) The provisions relating to substituted service of an originating process in the Rules of the Supreme Court 1957 were substantially the same as the related provisions in the Rules of High Court 1980. The Practice Note had not been withdrawn. It remained on foot and did apply.

(4) Every case must be decided on its own facts and according to its own circumstances. Although there was a failure to comply with para 5 of the Practice Note and sub-r 5(2) of O 62, the non-compliance was no more than an irregularity which could not result in the proceedings being nullified.

(5) The failure to comply did not contribute to a finding that on a balance of probabilities the third defendant did not actually receive notice of the writ.

(6) The object of the court was not to punish a litigant for non-observance of its rules, unless the litigant has been contumelious. In the instant case, the omission of the appellant appeared to have arisen from inadvertance and it was no more than an irregularity which standing by itself was not a ground for setting aside the judgment. There was no indication from the respondent that he was adversely affected by the omission.

(7) The respondent breached O 2 r 2(1). He failed to make his application to set aside the judgment for irregularity within a reasonable time and took fresh steps by entering an appearance and filing a defence well after becoming aware of the alleged irregularity.

(8) In this instance the appropriate person to suggest the mode of substituted service was not the process server but the solicitors in charge of the proceedings.

(9) The third defendant acted systematically in bad faith throughout these proceedings. He used the process of the court to delay repayment and thus brought the administration of justice into contempt by the public.

A **[Bahasa Malaysia summary**

Plaintif memberikan pinjaman kepada defendan pertama. Ianya dijamin secara persendirian oleh defendan kedua dan ketiga. Defendan-defendan gagal untuk membayar balik pinjaman itu walaupun dituntut berulang kali. Plaintif mengeluarkan saman
B terhadap defendan-defendan. Tetapi ia gagal dalam tiga cubaan untuk menyampaikannya kepada defendan kedua dan ketiga. Penyampaian ganti dilaksanakan mengikut perintah mahkamah. Penghakiman ingkar dimasukkan terhadap defendan kedua dan ketiga. Defendan ketiga tidak membayar hutang penghakiman walaupun beliau disampaikan dengan satu salinan penghakiman
C dan kemudiannya notis kebankrapan dan petisyen pemiutang.

Tiga tahun kemudian, defendan kedua dan ketiga memohon perintah untuk mengetepikan penghakiman ingkar itu atas alasan bahawa proses penyampaian adalah di luar aturan dan bahawa ada pembelaan atas merit. Permohonan mereka di hadapan penolong
D kanan pendaftar dibenarkan dan kebenaran diberikan kepada mereka untuk memfailkan pembelaan. Plaintif merayu terhadap keputusan itu. Rayuan itu ditolak oleh hakim yang bijaksana. Plaintif memohon kemudiannya untuk hujah lanjut mengikut peruntukan A 56 k 2(2) Kaedah-Kaedah Mahkamah Tinggi 1980 ('Kaedah-Kaedah tersebut'). Hakim yang bijaksana membenarkan
E permohonan plaintif. Defendan-defendan membangkitkan dua bantahan permulaan: (1) bahawa kes itu telah dihujahkan dan diputuskan, tidak ada hujah di hadapan hakim yang bijaksana dan oleh itu permohonan untuk hujah lanjut sepatutnya tidak dibenarkan; (2) bahawa keterangan atau afidavit lanjut tidak boleh
F dilayan. Bantahan-bantahan ini tidak dibenarkan. Hujah lanjut itu dibicarakan.

Pihak-pihak menghujahkan, antara lain, mengenai isu sama ada ketidakpatuhan terhadap Kaedah-Kaedah tersebut yang relevan dan Nota Amalan No 1 Tahun 1968 membatalkan prosiding itu
G dan oleh itu penghakiman patut diketepikan.

Diputuskan, mengetepikan perintah sebelum ini dan perintah penolong kanan pendaftar, kos kepada perayu:

(1) Berkenaan dengan bantahan permulaan yang pertama, A 56 k 2, yang telah diganti dengan aturan yang baru, bertujuan
H untuk memberikan pemeriksaan dan pertimbangan yang lebih terperinci mengenai perkara kamar dalam senarai am yang dikendalikan dalam kesesakan perbicaraan dalam kamar yang penuh dengan keputusan yang selalunya dibuat dalam masa 10 minit. Ia membuat peruntukan terhadap kesalahan yang
I berlaku dalam kes ini di mana mahkamah dengan muktamad menolak rayuan mempercayai bahawa peguam telah mengaku kalah apabila sebenarnya peguam hanya mengaku satu perkara dan hampir meneruskan untuk menghujahkan perkara itu apabila kes seterusnya pada senarai kausa pada hari itu

dipanggil. Ianya mesti dilayan sebagai kebenaran perbicaraan lanjut rayuan itu kerana hakim diberi kuasa untuk memberi kebenaran, memandangkan bahawa perintah yang dibuatnya belum disempurnakan.

(2) Berkenaan dengan bantahan permulaan yang kedua, oleh kerana afidavit-afidavit yang baru telah difailkan dengan persetujuan, defendan-defendan tidak boleh kemudiannya memungkiri.

(3) Peruntukan-peruntukan berkaitan dengan penyampaian ganti proses pemula dalam Kaedah-Kaedah Mahkamah Agung 1957 adalah pada amnya sama dengan peruntukan-peruntukan berkaitan dalam Kaedah-Kaedah Mahkamah Tinggi 1980. Nota Amalan tersebut masih tidak dibatalkan. Ia kekal ada dan terpakai.

(4) Tiap-tiap kes mesti diputuskan atas faktanya sendiri dan mengikut keadaan-keadaannya sendiri. Walaupun terdapat kegagalan untuk mematuhi perenggan 5 Nota Amalan dan A 62 k 5(2), ketidakpatuhan itu adalah tidak lebih daripada luar aturan yang tidak boleh mengakibatkan prosiding itu dibatalkan.

(5) Kegagalan untuk mematuhi tidak menyumbang kepada penemuan bahawa atas imbangan kebarangkalian defendan ketiga sebenarnya tidak menerima notis writ itu.

(6) Tujuan mahkamah bukan untuk menghukum seseorang litigan kerana tidak mematuhi kaedah-kaedah, melainkan litigan itu bersikap menghina. Dalam kes ini, peninggalan perayu nampaknya timbul daripada kelalaian dan ianya tidak lebih daripada satu luar aturan yang jika berdiri sendiri bukan alasan untuk mengetepikan penghakiman itu. Tidak ada petunjuk daripada penentang bahawa beliau terjejas dengan peninggalan itu.

(7) Penentang melanggar A 2 k 2(1). Beliau gagal untuk membuat permohonannya untuk mengetepikan penghakiman kerana luar aturan dalam masa yang munasabah dan mengambil langkah yang baru dengan memasukkan kehadiran dan memfailkan pembelaan setelah menyedari luar aturan yang dikatakan itu.

(8) Dalam keadaan ini orang yang sesuai untuk mencadangkan cara penyampaian ganti bukan penyampai proses tetapi peguam yang mengendalikan prosiding itu.

(9) Defendan ketiga bertindak secara sistematik dengan niat jahat sepanjang prosiding. Beliau menggunakan proses mahkamah untuk melambatkan bayaran balik dan oleh itu membawa pelaksanaan keadilan dalam penghinaan oleh orang ramai.]

Notes

For cases on further argument, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 197 and 3603.

For cases on substituted service, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 3023–3033; [1995] *Mallal's Digest* 324–325.

Cases referred to

Arab Malaysian Credit Bhd v Prinwell (M) Sdn Bhd [1993] 2 AMR 32:1909 (distd)
Guannex Leasing Sdn Bhd v Sebastian & Anor [1991] 1 MLJ 109 (refd)
Hamp-Adams v Hall [1911] 2 KB 942 (distd)
PT Pelajaran Nasional Indonesia v Joo Seang & Co Ltd [1958] MLJ 113 (distd)
Phillipson & Son v Emanuel (1887) 56 LT 858 (distd)
Ratnam v Cumarasamy & Anor [1965] 1 MLJ 228 (refd)
Wood v Anderson Foundry Co (1888) 36 WR 918 (distd)
United Asian Bank Bhd v Bhassie [1991] 2 MLJ 122 (distd)

Legislation referred to

Rules of High Court 1980 O 2 r 2 (1), O 62 r 5(2)

Lee Fook Leong (*Lee Fook Leong & Co*) for the plaintiff.
B Thangaraj (*Thangaraj & Associates*) for the defendant.

Cur Adv Vult

Richard Talalla J: The plaintiff is a licensed finance company. The first defendant under the hand of the third defendant who was the Managing Director and Chairman of the first defendant made an application to the plaintiff for a loan of RM1.6 million. The second and third defendants as proposed guarantors gave in writing their personal particulars including their respective addresses as No 28, Jalan Ibrahim, Segamat, Johor (the said address). That was also the stated address of the first defendant although its registered office was stated as being one at Muar. By a letter dated 4 July 1984 the plaintiff offered the first defendant a fixed loan of RM2 million upon terms and conditions which included interest at the rate of 15.5% per annum with monthly rests, the period of loan to be not exceeding three years, the security for the loan to be:

(a) a third party first legal charge over land and building held under a certain grant of land and a number of certificates of title; and

(b) joint and several guarantees to be given by the second and the third defendants.

There was also a repayment schedule for payment not later than 36 months. The servicing of interest was to be on a monthly basis. The first defendant under the hand of the third defendant signed the letter dated 4 July 1984 accepting the plaintiff's offer and this constituted a contract of loan between the plaintiff and the first defendant ('the agreement'). The second and third defendants in fulfillment of one of the said terms and conditions each executed a personal guarantee ('the guarantees') in favour of the plaintiff. The defendants failed to service the loan despite repeated demands. On 4 October 1986 the plaintiff

caused a writ to be issued against the three defendants in these proceedings with a statement of claim pleading the loan, its salient terms, including the guarantees and the said demands and claiming a sum of RM2,146,065.80 with interest and overdue interest thereon at 15.5% per annum and 18.5% per annum respectively, on monthly rests made up as follows that is to say, advance RM2,000,000, interest and overdue interest since November 1985 RM146,065.80. The plaintiff also claimed interest and costs.

On 17 November 1986 the plaintiff applied by summons in chambers returnable before the senior assistant registrar ('the SAR') for an order of substituted service of the writ and statement of claim by, inter alia, posting copies thereof on the front door of the premises at the said address. This summons was supported by two affidavits, one by Encik Ismail bin Saidon ('Ismail') affirmed on 11 November 1986 averring that he had personally called at the second and third defendants' place, being at the said address on the 28 October 1986, 1 November 1986, and 8 November 1986 at about 1.00pm, 2.30pm and 2.00pm respectively and that on all three occasions he was told by the inmates that the second and third defendants were not in. The other affidavit was affirmed on 11 November 1986 by Encik Lee Fook Leong averring that he was the solicitor in charge of the matter and that the process server had made reasonable effort and used all due means in his power to serve the said writ of summons and statement of claim and that he had made three attempts but was unsuccessful. He also affirmed to a belief that the second and third defendants had full knowledge of the said writ of summons and statement of claim and that the defendants were deliberately trying to evade the service of the process on them. The summons in chambers was heard by the SAR on 16 June 1987 and he made an order allowing the plaintiff's application. On 10 September 1987 Ismail effected such service pursuant to the said order and made an affidavit of service which was duly affirmed on 11 September 1987 and filed on 21 September 1987. Mr Lee Fook Leong also made an affidavit of service which was duly affirmed on 15 September 1987 wherein he stated that he had on 13 September 1987 at about 12.10pm posted a sealed copy of the order dated 16 June 1987 together with the writ of summons on the notice board of the court.

On 19 October 1987, judgment in default of appearance was entered against the second and third defendants. The third defendant did nothing towards paying the judgment debt despite a copy of the judgment being served on him by letter dated 18 November 1987 from the plaintiff's solicitors and demanding payment with notice of further proceedings in the event of default of payment. He made no payment towards the judgment debt despite being served with a bankruptcy notice in regard thereto on 6 May 1988. On 9 March 1989 the third defendant was served with a creditor's petition. He still did not do anything about settling the debt. It was only when he stood facing being made a bankrupt that he instructed solicitors to apply to set aside the judgment.

On 28 October 1990 solicitors acting for the second and third defendants applied by summons in chambers before the SAR for an order that the said judgment be set aside. This summons was accompanied by a certificate of urgency given under the hand of the solicitor handling the application on behalf of the second and third defendants, stating as a ground of urgency that a creditor's petition had been fixed for hearing on 4 November 1990. The summons was supported by an affidavit of the third defendant wherein he affirmed that he was duly authorized to affirm that affidavit for and on behalf of the second defendant and claimed that the judgment obtained was irregular by reason that they were not served with a writ of summons, and as to a defence on the merits, a hotch potch namely that there were no demands made on them, that there was no consideration for the guarantee, that the valuation report by CH Williams Talhar & Wong Sdn Bhd was not revalidated 'and other conditions of the loan as were led to believe were not complied with', and that the securities, if any, had not been perfected nor realized to protect the guarantors' liability. The plaintiff's senior manager affirmed an affidavit in reply, wherein he spoke, inter alia, to the filing of the bankruptcy notice and the creditor's petition and stated that both defendants had done nothing whatsoever towards repaying the loan and interest, that the judgment was regular and the second and third defendants had no defence to this action and had filed the application solely for the purpose of frustrating the plaintiff's right to execute the said judgment.

The summons came on before the SAR on 3 November 1990, was adjourned to 16 December 1990 and on that date adjourned further to 30 December 1990 when he allowed the application and gave leave to the defendants to file their defence. He did not appear to have made any order in regard to their appearance. The plaintiff being dissatisfied with the decision of the SAR filed notice of appeal the next day and the appeal came on for hearing before me on 2 January 1991 and was adjourned for hearing to 9 June 1991.

Meanwhile on 11 December 1990, the second and third defendants applied by summons in chambers returnable before the judge on 26 December 1990 for an order that these proceedings be transferred to the Kuala Lumpur High Court upon grounds in an affidavit affirmed by the third defendant that the cause of action arose from transactions that were carried out in Kuala Lumpur as evidenced by the letter dated 4 July 1984 above stated, that all witnesses available in respect of this case were in Kuala Lumpur and that in the interest of justice, the Kuala Lumpur High Court would be the proper and convenient forum to dispose of this case. The senior manager's affidavit in reply was that although the letter of offer dated 4 July 1984 originated from Kuala Lumpur, all subsequent transactions to the said letter were handled and carried out by the plaintiff at its branch office at Batu Pahat, Johor and that similarly all security documents including the guarantees were executed by the defendants in Batu Pahat and that the loan sums were released and disbursed to the first defendant by the plaintiff at its said

branch office. The defendants as stated above had given Segamat as their respective addresses when they executed the guarantees on 7 August 1984 and as at 27 October 1990, the third defendant was still residing and carrying on business at No 28, Jalan Ibrahim, Segamat, Johor. The record shows that the defendants did not pursue their application for transfer, which appeared to have been abandoned.

On 4 January 1991, the second and third defendants entered an appearance in this action. On 9 January 1991, the second and third defendants filed their defence wherein they pleaded in denial of the plaintiff's pleaded claim that the plaintiff had failed to make any proper demands nor comply with the terms of the offer in obtaining the necessary valuations in releasing the loan and as such was in breach of the agreement. The defendants also averred that the plaintiff was negligent in not disposing of the securities at the earliest possible time and at the best price in order to minimize the second and third defendants' liability.

On 9 June 1991 I dismissed the appeal with costs. On the same day the plaintiff applied pursuant to the provisions of O 56 r 2(2) of the Rules of the High Court 1980 ('the Rules') for further argument and on 11 June 1991 I allowed that application and after consultation with the solicitors last referred to the further argument was appointed to be heard on 11 August 1991. On that day, on the application of counsel for both parties, the hearing of the further argument was adjourned to 8 January 1992. On that date it was adjourned to 15 April 1992 and again on that date it was adjourned for hearing to 8 July 1992. On 8 July 1992 counsel for the defendants raised two preliminary objections namely that the plaintiff had obtained a judgment in default of appearance, that the defendants obtained before the SAR an order setting aside the judgment in default, that the plaintiff then appealed to the judge in chambers against the order, that the judge dismissed the appeal with costs, that the judge did so upon counsel for the plaintiff conceding that service of the writ of summons was irregular, that there was no argument before the judge and that therefore the application for further argument should not have been allowed. Counsel for the defendants submitted as authority for his proposition the case of *Guannex Leasing Sdn Bhd v Sebastian & Anor* [1991] 1 MLJ 109. In that case the first and second defendants appealed against the registrar's decision to grant leave to the plaintiff to enter final judgment against the defendants. At the hearing of the appeal, the first defendant appeared without his counsel and asked for an adjournment in order to retain new counsel. The court refused to grant the adjournment and dismissed the appeal on the ground that the first defendant had about four months after discharging his solicitors to get new solicitors and yet had not done so. The first defendant then applied for further argument in open court under O 56 r 2(2) abovestated and also lodged an appeal against the decision of the judge. In dismissing the first defendant's application the learned judge at p 109 held as follows:

> As to whether the defendants were entitled to ask for further arguments in open court, it is clear that there must be an argument before the order is made in chambers, so that the party who asks for further argument must present his argument in addition to what has already been argued in chambers. The party must either introduce additional issues or authorities or develop its argument to a more advanced point for the consideration of the judge. If there has been no argument at all in chambers, O 56 r 2(2) does not apply.

As to the first preliminary objection the view I took was that O 56 r 2 which since then has been substituted by a new rule had to be construed against the backdrop of the mischief it provided against including the literal meaning of the words. Its purpose was to provide for a more detailed examination and consideration of a chamber matter in the general list dealt with in the hurly burly of chamber sittings replete with often a ten minute rule. Order 56 provided against the very mischief that occurred here where the court peremptorily dismissed the appeal believing that counsel had conceded defeat when in fact counsel had only conceded one point and was about to proceed to argue the matter when the next case on that day's cause list was called out. As had been my practice chamber applications were being heard in open court and counsel in deference to the court was loath to interject. Such being the circumstances and the plaintiff and his counsel being in no way to blame, if the allowance could not stand as an allowance of further argument, there having been no argument in the first place, and here I must agree with counsel for the third defendant, then it had to be treated as an allowance of further hearing of the appeal as I was empowered to allow seeing that the order I made dismissing the appeal had not been perfected.

The second preliminary objection was that no further evidence or affidavits should be entertained. Counsel submitted as authority in support of his contention the case of *United Asian Bank Bhd v Bhassie* [1991] 2 MLJ 122 where the plaintiff had made application in chambers for an order that the defence and counterclaim of the defendant be dismissed with costs, which application was heard and dismissed. The plaintiff applied for an adjournment of the matter into open court for further argument. The plaintiff had filed a new affidavit after the order made in chambers, the admissibility of which was objected to by counsel for the defendant. The question was whether a new affidavit or fresh evidence could be introduced at the stage of further argument. In disallowing the admission of the new affidavit the learned judge at p 122 said:

> When a matter is adjourned into open court for further argument, no fresh evidence or new affidavit should be considered at the hearing of the further argument, for further argument does not mean further evidence or further affidavit.

I took the view that the further affidavits were filed by consent and the defendants could not then renege by arguing in the face of their consent that the court has no jurisdiction to allow the further affidavit based on *United Asian Bank Bhd v Bhassie*. In any event the defendants were out

of time inasmuch as they were complaining that the court had no jurisdiction to allow further argument. Further argument was in fact allowed on or about 23 June 1991. The defendants being aggrieved by the allowance should have appealed against the court's decision. Accordingly the preliminary objections were disallowed. A

The hearing was then adjourned to 18 January 1993 when on that day it was again adjourned to 2 March 1993 and on that day again adjourned to 28 June 1993. On the day last referred to it was adjourned to 1 November 1993. There were further adjournments to 31 March 1994, and again to 2 July 1994, the latter for fixing. It was then fixed for hearing on 3 October 1994 and it came on yet again for hearing on 5 December 1994. B C

Meanwhile on 29 September 1994 the third defendant wrote to the court saying that he had discharged his solicitors Messrs Paul Ong & Associates and that he would be acting in person, and furthermore all documents to the said action were with the former solicitors and he needed time to study the matter himself and as such requested an adjournment. On the same day the third defendant filed a notice of intention to act in person. D

On 3 December 1994 the court informed the parties that the case was to be heard on 6 January 1995. On 27 December 1994 the third defendant wrote to the court requesting that the hearing fixed for 6 January 1995 be adjourned to a later date as he intended to obtain the notes of evidence and to furnish them to the solicitors that he desired to appoint. E

On 6 January 1995 the third defendant appeared before me and sought an adjournment and this was granted and the matter was adjourned to 23 February 1995. On 21 February 1995 the third defendant's new solicitors Messrs Thangaraj & Associates wrote to the court saying that they had been duly appointed to act for the third defendant, that 23 February 1995 was not suitable as they had a hearing in the High Court at Kuala Lumpur, and they requested an adjournment which was granted. F G

The further argument was finally heard on 1 June 1995 when Mr Lee Fook Leong of counsel appeared on behalf of the appellant and Mr B Thangaraj of counsel appeared on behalf of the third defendant (the respondent), the second defendant having since passed away. At this hearing Mr Thangaraj confined his argument to only two issues, namely that the judgment was irregular and that there was a defence on the merits. H

As to the first issue the respondent complained that the appellant failed to comply with several requirements of the Practice Note No 1 of 1968 ('the Practice Note'). The appellant's reply was that the Practice Note no more applies because it was made under the Rules of the Supreme court 1957 ('the old Rules') which have been superseded by the Rules. I do not agree. The provisions relating to substituted service of an originating process in the old Rules are substantially the same as I

A the related provisions in the Rules. The Practice Note has not been withdrawn. It remains on foot and does apply.

Counsel for the respondent complained that the first sentence of the note was not complied with and in this regard he referred to *Mallal's Supreme Court Practice* 1983, 2nd Ed, at p 851 stating that the object and
B effect of the rule which underlies all procedure with regard to substituted service is that the defendant will probably get to hear of the proceedings, and at p 852 stating that it will be necessary to show why it has been impracticable for any reason to serve the defendant personally.

The Practice Note reads as follows:

C The practice governing applications for substituted service in the High court in Malaya shall follow that in the High Court in England, as provided for in Order 10 rule 2 of the Rules of Supreme Court 1957. The practice, taken from the 1957 White Book, page 88, is here re-produced.

1 Two calls should be made.

D 2 The calls should be made at the defendant's residence, permanent or temporary, if known; otherwise, or if the claim relates to the defendant's business, at his business address. If the defendant has left the address given on the writ, this should be stated in the affidavit. If a copy of the document to be served is left, it must be in a sealed envelope addressed to the defendant.

E 3 The calls should be made on weekdays and at reasonable hours.

4 Each call should be on a separate day.

5 The second call should be made by appointment by letter sent to the defendant by ordinary prepaid letter post, giving not less than two clear days' notice, enclosing a copy of the document to be served, and offering an opportunity of making a different appointment.

F 6 On keeping the appointment the process server should inquire whether the defendant has received the letter of appointment with the copy document and if it is stated that the defendant, is away, inquiry should be made whether or not letters are being or have been forwarded to an address within the jurisdiction; the object is to show that the defendant has received communications sent to him.

G 7 The affidavit in support of the application should deal with all the foregoing requirements and should further state whether the letter of appointment has been returned or not, and any answer received should be exhibited. A copy of the document to be served should accompany the affidavit.

H No prescribed form is necessary for the letter of appointment.

The letter of appointment should ordinarily be sent by the solicitors for the plaintiff after ascertaining from the process servers in the High court and other courts their available times and dates from the second call. The facts regarding the letter of appointment should be stated in the affidavit in support.

I Compliance with the above practice will ensure that the application for substituted service will be grounded on other than a mere statement that the defendant is evading service. Such a statement should never be sufficient to apply for an order for substituted service. If the above practice is followed, as required by the Rules of the Supreme Court

> 1957, the efforts which have been made to find the defendant and the reasons for believing that he is keeping out of the way to avoid service will be before the Senior Assistant Registrar/Assistant Registrar before the order is made.

He also referred to the affidavit of service and affidavit of non-service which bore no reference to the making of an appointment as was required under para 5 of the Practice Note and that consequently it had to be inferred that no such appointment was made leading to a finding that para 5 had been breached. Next counsel argued that the address of attempted service was a business address, that the times of the attempted service were on 28 October 1986 at 1.00pm, on 1 November 1986 at 2.30pm and on 8 November 1986 at 2.00pm which he submitted, were not in accordance with para 3 of the Practice Note and that the calls should have been made on weekdays and at a reasonable hour. The respondent argued in respect of the second sentence to the said note that the belief of evasion must come from the process server and not the solicitors. I do not think that is necessarily so. It is not expressly provide so. To my mind, depending on the facts and circumstances of the case, one as much as the other is capable of making a value assessment as to evasion of service. Each case has to be decided on its own facts. The respondent admittedly worked and resided at the premises and therefore the days and hours of attempted service were reasonable. Accordingly I found that para 3 of the Practice Note had not been breached. At one stage the respondent had affirmed that during the period of attempted service he was working in Melaka but apart from this bald statement he gave no particulars and in the end there was no reference to or argument based on that statement. I therefore disregarded it. More to the point is the fact that the respondent did not deny Ismail's affirmation that there were inmates at the premises on the occasions when he visited the same to effect service. That being the case the onus of proof was on the respondent to inform the court who these inmates were and whether they had told him of the visits and Ismail's request for an appointment (he affirmed in his affidavit that he made such a request) and if not why not. He did not so inform the court. Accordingly and on the overall facts and circumstances of this case I found that whilst there was a failure to comply with para 5 of the Practice Note, the failure pursuant to sub-r 1(1) of O 2 of the Rules was no more than an irregularity which could not result in the proceedings being nullified.

Then it was advanced on behalf of the respondent that the application for the order for substituted service was not in conformity with sub-r 5(2) of O 62 of the Rules which requires that such an application must be supported by an affidavit in Form 136. The form is to be found in Appendix 'A' of the Rules. The note to that Form reads as follows:

> The affidavit should also specify the method of substituted service asked for, and state that if such service is ordered it will probably be effectual in bringing the writ (or as may be) to the knowledge of the defendant. If the defendant is evading service the affidavit should so state.

A On this latter point counsel for the respondent referred to the case of *Arab Malaysian Credit Berhad v Prinwell (M) Sdn Bhd* [1993] 2 AMR 32:1909 where the ninth defendant had appealed against the learned senior assistant registrar's decision dismissing his application by summons in chambers to set aside a judgment in default of appearance. The appellant's contention was that the judgment obtained by the B plaintiff against the defendant was an irregular judgment and as such ought to be set aside ex debito justitiae, his grounds being that the plaintiff's application for substituted service did not comply with O 62 r 5(2) and in particular the note to Form 136 of the Rules as the method of the substituted service proposed was not specified therein. C In setting aside the judgment the learned judge at p 1911 said:

> From my perusal of the affidavit in support of the application for substituted service I must agree with the submission of learned counsel for appellant that no mention is made of the mode of the proposed substituted service and hence the learned Senior Assistant Registrar ought not to have ordered substituted service. I therefore find that the D default judgment obtained against the appellant to be an irregular judgment and consequently the appellant is entitled to have it set aside ex debitio justitiae. In view of this finding I feel there is no need for me to go into the merits and the appeal by the ninth defendant is hereby allowed with costs and the default judgment is set aside.

E Again I found that the appellant failed to comply with the requirement set out in the first sentence of the note to Form 136 and again I found that the failure amounted to an irregularity which did not nullify the proceedings. As to the *Arab Malaysian* case there is nothing in the judgment to indicate that the learned judge in arriving at his decision had in mind O 2 of the Rules, the provisions of which in matters of this F nature I believe should have been applied and in its application the judicial discretion exercised. It is also not known upon what facts and circumstances his Lordship arrived at his decision. It has been repeated ad nauseam that every case has to be decided on its own facts and according to its own circumstances. I do not see the decision in the G *Arab Malaysian* case as laying down any broad principle that the failure to mention the method of service as required by the said note, by itself renders a default judgment consequently obtained irregular. If it does lay down such a principle then with respect I do not agree with the decision.

H Counsel for the respondent also referred to the case of *PT Pelajaran Nasional Indonesia v Joo Seang & Co Ltd* [1958] MLJ 113. There the defendant sought to set aside a final judgment entered by the plaintiff in default of the defendant's appearance. The defendant was a company incorporated in the Federation of Malaya. The plaintiff's solicitors upon inquiry from the Registrar of Companies ('the Registrar') was I informed by the latter that the registered office of the defendant was at 144 Beach Street, Penang. The plaintiff thereupon addressed a notice of action to the defendant demanding payment of a sum of $116,409.84 allegedly due to them. The said notice was returned with a covering

letter addressed at 144 Beach Street and signed by someone purporting to be the managing director of Joo Seang & Co Ltd stating, inter alia, that the notice was apparently meant for Messrs Joo Seang & Co. When the notice was again sent to that company, the defendant denied the existence of any agreement between itself and the plaintiff. The plaintiff took out a writ of summons and on the information already received from the Registrar that the defendant's registered office was at 144 Beach Street, caused the writ to be served there and eventually obtained the said judgment. It turned out that the Registrar had inadvertently misinformed the plaintiff's solicitors of the situation of the registered office which though originally at the address informed was at the material time at No 146 Beach Street, Penang. In setting aside the default judgment the learned judge at pp 113 and 114 said where the law provides a particular method or form of procedure for effecting service, or a particular place at which, or to which, service may be effected, then there must be strict compliance with those provisions, and the court would set aside a judgment obtained by default where the requirements have not been complied with. In so ruling the learned judge appeared to be relying on three cases. At p 115 the learned judge referred to the case of *Hamp-Adams v Hall* [1911] 2 KB 942 where Vanghan Williams LJ said that where proceedings are taken by a plaintiff in the absence of the defendant it is most important that there should be at every stage a strict compliance with the rules. Next was the case of *Phillipson & Son v Emanuel* (1887) 56 LT 858 where the defendant applied by motion to set aside a judgment obtained against him on the ground that a duplicate copy thereof was served upon him and that he requested to see the original. It was contended on behalf of the plaintiff that even though there may have been an irregularity the defendant had not sworn that the proceedings never came to his knowledge nor had he any merits to the defence. Nevertheless, the Divisional Court (consisting of Lord Coleridge CJ and Day J) held that there had, in fact, been no service and that the proceedings must be set aside. The third case was *Wood v Anderson Foundry Co* (1888) 36 WR 918, where the court held that service at any office of the company other than the registered office is bad and must be set aside. In that case the company had their registered office in Scotland but carried on branch works in England. The writ in the action was served on the manager of the branch works and a copy had also been sent by post to the registered office. Although I treat the first two cases with great respect, neither of them is binding on me. I do accept the decision of Rigby J and the decision in *Wood's* case but have to say that they are both distinguishable on the facts and therefore do not concern me here. Those two cases related to failure to comply with statutory requirements under companies legislation which rendered the proceedings in which they occurred a nullity. In this regard see the *Supreme Court Practice 1993* Vol 1 para 2/1/1. Reverting to the *Hamp-Adams* case, bearing in mind that every case must be looked at on its own facts and circumstances, circumstances pertaining in 1995 and not 1911 when that case was decided, I cannot see myself setting aside a judgment obtained in default of appearance on the

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grounds of irregularity of service of the writ of summons, that irregularity being no more than an omission on the part of the process server to endorse the writ with the date, time and place of the same, especially if that irregularity did nothing to contribute to a likelihood or probability that the defendant did not receive notice of the writ. In such an event the provisions of O 2 r 1(1) must be brought into operation and the omission treated as no more than an irregularity and certainly not as one rendering the substituted service of the writ a nullity. As to the *Phillipson* case I would go no further than to repeat yet again that each case is to be decided on its own facts. In that case a motion on appeal from chambers to set aside a judgment on the grounds that, as I have already stated, the original writ was not shown to the defendant when the writ was served upon him, although he requested to see the original, Master Walton made an order setting the judgment aside, but Smith J in chambers reversed this order, and restored the judgment. It was contended on behalf of the plaintiff that even though there may have been an irregularity in serving of the writ, the defendant had not sworn that the proceedings never came to his knowledge, nor that he had any merits to the defence. Nevertheless the Divisional Court held that there had, in fact, been no service and that the proceedings must be set aside. It is not known why the defendant was not shown the original writ. I can think of no plausible reason for the defendant not being shown the writ upon his having requested to see it. It points to a deliberate refusal to show the writ amounting to contumelious conduct and it is not surprising for Day J supposing for the purpose of counsel's argument, that it was a mere irregularity, to have said that it was an irregularity of the grossest possible description. In the present case there was no question of refusal on the part of the process server.

In this instance, granted that there was a failure to comply with sub-r 5(2) of O 62, in particular the note in the prescribed form of affidavit and the Practice Note, the question that I had to ask myself was whether that failure contributed to a finding that on a balance of probabilities the third defendant did not actually receive notice of the writ. My view is that the failure did not so contribute. The appellant of course should have complied so. Rules of court must be obeyed. See *Ratnam v Cumarasamy & Anor* [1965] 1 MLJ 228; likewise directions in Practice Notes. However, the object of the court is not to punish a litigant for non observance of its rules, unless of course the litigant has been contumelious. Here there was no question of the appellant having been so. The omission appeared to have arisen from inadvertence and in my view it was no more than an irregularity which standing by itself was not a ground for setting aside the judgment. There was no indication from the respondent that he was adversely affected by the omission.

The learned SAR on setting aside the judgment did not give reasons for doing so. Thus it is not known whether the judgment was set aside on grounds of irregularity of service of the writ or that the service was regular but the respondent had a defence on the merits. In giving the respondent leave to file a defence the SAR did not seem to

have made any order or direction in regard to the filing of an appearance by the respondent. Be that as it may the respondent did enter an appearance apart from filing a defence. The respondent chose not to appeal against the decision of the SAR. There was no cross appeal. The respondent did not seek a declaration that service of the writ on him was irregular. Thus he submitted to the jurisdiction of the court. In so doing he forfeited or must be taken to have abandoned his right to claim that the service of the writ of summons on him was irregular and bad. In any event I found that the respondent is precluded from making such a claim on the ground that he failed to do so within a reasonable time of his having notice of the judgment. The respondent did not dispute receipt of the solicitor's notice enclosing a copy of the judgment, nor did he dispute service on him of the bankruptcy notice and creditor's petition both of which had as their basis the said judgment. To boot he gave no explanation at all for the delay in applying for an order to set aside the judgment. It is provided in O 2 r 2(1) of the Rules that an application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity. The respondent failed on both counts. He failed to make his application within a reasonable time and he took fresh steps by entering an appearance and filing a defence well after becoming aware of the alleged irregularity. I accept that the appellant had effectively complied with all the requirements regarding the service of the writ by substituted service provided for in the Rules. I find that in this instance the appropriate person to suggest the mode of substituted service was not the process server as suggested by counsel for the respondent but the solicitor for the appellant in charge of the proceedings as indeed was done in this case. The grounds for the application for the setting aside of the judgment on the merits were a miscellany namely as stated above. There was no merit in any of them and they were not addressed by counsel for the respondent except cursorily.

I formed the opinion that the third defendant throughout these proceedings acted systematically in bad faith. The affidavit evidence discloses that it was the respondent who was the mastermind behind this transaction, being the Managing Director and Chairman of the first defendant company, the second defendant being his driver, no doubt set up as a director in the first defendant company in order to obtain benefits as a purported bumiputra company. As I saw it the bottom line was that the first defendant at the instance of the respondent and as guaranteed by him the respondent and the second defendant borrowed RM2,000,000 from the appellant upon a promise to repay the same within a period not exceeding three years. That was in 1984. So the appellant should have had its money back with earned interest by 1987. Through the respondent's many machinations, the appellant remains unpaid. The respondent has successfully used the process of the court to delay repayment. That use is in truth an abuse of the process of the court. The respondent should not be allowed to use the process of the

court to cause delay. His conduct in doing so brings the administration of justice into contempt by the public. The court itself has not been responsible for any delay in these proceedings except in June 1993 when I was on leave for one month and again in December 1993, January and February 1994 when I was on medical leave, and again for a period of three months thereafter when there was no Judge available to hold the court in Muar. The rest of the delay must lie largely at the feet of the respondent.

Accordingly I set aside my previous order wherein I dismissed the appellant's appeal and in substitution thereof I ordered that the order of the SAR made on 30 December 1990 setting aside the judgment in default of appearance entered on 19 October 1987, be set aside. The appellant was to have the costs of the appeal including the further argument and the application before the SAR, to be taxed.

Order accordingly.

Reported by Simon CK Chui